

BEFORE THE BOARD OF OUTFITTERS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of)	NOTICE OF AMENDMENT AND
ARM 24.171.401 fees, 24.171.408)	REPEAL
outfitter records, 24.171.413)	
watercraft identification, 24.171.502)	
outfitter qualifications, 24.171.505)	
fishing outfitter operations plan,)	
24.171.507 outfitter examination,)	
24.171.520 operations plans and)	
amendments, 24.171.2101 renewals,)	
24.171.2301 unprofessional conduct)	
and misconduct, and the repeal of)	
24.171.702 transfer of river-use days)	

TO: All Concerned Persons

1. On May 20, 2016, the Board of Outfitters (board) published MAR Notice No. 24-171-36 regarding the public hearing on the proposed amendment and repeal of the above-stated rules, at page 855 of the 2016 Montana Administrative Register, Issue No. 10.

2. On June 10, 2016, a public hearing was held on the proposed amendment and repeal of the above-stated rules in Helena. Several comments were received by the June 17, 2016, deadline.

3. The board has thoroughly considered the comments received. A summary of the comments and the board responses are as follows:

COMMENT 1: Numerous commenters expressed general agreement with one or more of the proposed rule changes and specifically regarding the amendments to ARM 24.171.408 and 24.171.520, which implement statutory changes following enactment of House Bill 274 in 2013.

RESPONSE 1: The board appreciates all comments made during the rulemaking process. The board is amending and repealing the rules exactly as proposed, with only minor, non-substantive changes to ARM 24.171.408 and 24.171.2301.

COMMENT 2: Commenters supporting the proposed changes urged the board to accept the proposed amendments as eliminating wasteful, redundant, and unnecessary reporting requirements. Some commenters stated that the current process of collecting information that is also reported on forms provided by the department is a waste of both time and money, results in confusing and voluminous records that are neither organized nor useful, and contributed to the recent publication of an admittedly inaccurate and erroneous map purporting to describe

private property accessible to licensed outfitters. One commenter likened the submission of underlying permits and other documents to support an outfitter's operations plan to submitting all of one's receipts to the Internal Revenue Service and then expecting the IRS to prepare the tax return. Commenters believed the information should be reported in summary fashion, and remain subject to audits and investigations by the board and law enforcement agencies such as the Montana Department of Fish, Wildlife and Parks and other state and federal agencies.

RESPONSE 2: In general, the board agrees with these comments, though one or more board members may not agree with the IRS analogy.

COMMENT 3: One commenter stated that the amendments to ARM 24.171.2101 will properly reduce unnecessary expenditures of time and money at renewal.

RESPONSE 3: The board acknowledges this was one reason for the proposed amendment to the rule.

COMMENT 4: Some commenters supported the proposed rule changes on the basis that their privacy interests in their records are appropriately recognized by the amendments to ARM 24.171.408 and 24.171.2301. One commenter asserted that the current rule allows for an infringement of constitutional rights. The commenters acknowledged that governmental agencies may properly access outfitter records for legitimate purposes, such as law enforcement, though some believed that an outfitter must be notified when an investigation is occurring.

RESPONSE 4: While discussing these comments regarding the balance between the public's right to know and an outfitter's right of privacy, the board determined that the language proposed in ARM 24.171.408 and 24.171.2301 is somewhat ambiguous. The board decided to further amend the organizational structure of these rules to remove the ambiguity, but remain consistent with the board's original intent. The board does not believe the rule violates the Montana or U.S. Constitution, as it does not authorize the search of the outfitter's premises by law enforcement without a warrant. The board notes that an outfitter may not always be informed of an investigation, but will know of requests for production of business documents under ARM 24.171.408, as those requests go to the outfitter.

COMMENT 5: One commenter rejected the board's rationale for not allowing optional submission of supportive documentation as part of an outfitter's annual reporting, especially relevant to the operations plan. The commenter believed the auditing process is a dual reporting system, and that optional submission of documentation would improve efficiency by eliminating the need to request documents already in the board's possession.

RESPONSE 5: The board does not agree with the commenter's rationale and is amending the rules regarding documentation exactly as proposed. The board concluded that voluntary submission of documents by only some licensees would not create efficiencies since audited outfitters can already supplement previously

submitted information, and notes that because prior submissions are voluntary, they are not necessarily complete. The comments addressing department auditing process are beyond the scope of this rule notice.

COMMENT 6: Several commenters expressed concern that the elimination of certain reporting requirements does a disservice to the public while benefitting the industry. The commenters believed using technology in cooperation with other regulatory agencies ought to benefit those burdened with regulatory reporting requirements by making reporting efficient and meaningful. Commenters further stated that some of the proposed changes may prevent the accurate, complete, and timely reporting necessary to ensure the public is provided information relevant to the public's resources.

RESPONSE 6: The board strongly agrees that the considerations raised by these commenters are extremely important to the public, and thus to the board. The board also agrees that the use of technology ought to increase efficiencies for both the outfitters producing the data and the regulatory agencies that maintain and use the data for the public benefit. However, the board disagrees that any proposed change decreases the effectiveness or the completeness of the information being provided. The proposed changes will increase the accuracy and timeliness of data reporting while avoiding the collection and storage of repetitive records that are rarely used. The data set being collected is consistent with requests from the Department of Fish, Wildlife and Parks, and the means of collection is expected to be more efficient while the resulting records should be more usable to the board and FWP. While the underlying records upon which the data is based will be maintained by the outfitters rather than the board, those records remain subject to audit and investigation. The board concluded that the proposed amendments will maintain transparency and, being a more efficient process, reinforce the public's trust in the board's work.

COMMENT 7: One commenter offered specific support for the boat decal amendments, indicating the use of multi-year decals eliminates an unnecessary expense related to the annual issuance of decals.

RESPONSE 7: The board appreciates all comments made during the rulemaking process.

COMMENT 8: Some commenters insisted the reporting of harvested game animals, and other biological data, ought to be included. The commenters reminded the board of its obligation under the Montana Constitution with respect to the public's right to know, and urged the board to reconsider the amendments to include the "who, what, when, and where" as biological data available to the public. The commenters stated the information is important to the public since it is the harvest of public trust resources by commercial interests, even though much of it occurs on private land, and needs to be archived for use by biologists now and into the future.

RESPONSE 8: The board notes that this comment exceeds the scope of this rule notice as no changes were proposed to ARM 24.171.408(2), which requires all

outfitters to report a set of data to the board on forms prescribed by the department, including the "outfitter log." Moreover, the board obtained input from the Department of Fish, Wildlife and Parks regarding amendments to ARM 24.171.408(2), as part of MAR Notice No. 24-171-34 and effective on January 30, 2015. As a licensing agency, the board cooperates with FWP, but it is FWP's responsibility to collect data for the purpose of, and develop policies relevant to, managing Montana's wildlife and providing public access to those opportunities.

COMMENT 9: A few commenters opposed the elimination of "at all times" from ARM 24.171.408(1), and suggested that a reasonable alternative would be a 48-hour requirement for updating records.

RESPONSE 9: The board cannot impose a requirement that would make it a misdemeanor crime and the basis of unprofessional conduct whenever an outfitter's records do not immediately reflect the business transacted. In reality, the operation of a small business necessarily provides a time between an event and the recordation of the event. Specifying "at all times" seemed to mandate a real-time updating of records under penalty of sanction, and the suggestion that an arbitrary timeline of 48 hours or so would be reasonable is without any kind of precedence in the recordkeeping requirements of other businesses. The proposed rule amendments do not excuse outfitters from keeping accurate records.

COMMENT 10: One commenter expressed support for proposed amendments to the outfitter experience requirements in ARM 24.171.502. The commenter noted that the rule amendments will allow credit for comparable out-of-state guiding experience to those seeking licensure in Montana, but the credit will only apply to those seeking a fishing outfitter license. The proposed amendments do not reflect a similar change for those seeking a hunting outfitter license.

RESPONSE 10: The board acknowledges that an error was made in the preparation of the proposal notice. The board intended out-of-state guiding experience to qualify as experience toward a Montana outfitter license, regardless of whether the applicant was seeking licensure as a hunting outfitter or a fishing outfitter. However, to correct the error, the board is required to republish the entire notice, and allow another public comment period. As time is of the essence regarding the other amendments in this notice, and because proceeding with the changes as proposed will not create any new problems, the board is amending ARM 24.171.502 exactly as proposed and will address the error in a future project.

COMMENT 11: One commenter suggested the board should audit a significant number of licensees to ensure or encourage compliance.

RESPONSE 11: The comment falls outside the scope of this rule notice. While the auditing of licensees is necessarily a part of the board's business as it relates to enforcing the rules as amended in this rule notice, the determination of how many to audit is not set by rule. Instead, the board will consider audit percentage at a future

board meeting and may change it from time to time based on the needs of the board and the rates of compliance.

A number of other comments received during the comment period spoke to matters outside the scope of the rule proposal notice and are not addressed in this document.

4. The board has amended ARM 24.171.401, 24.171.413, 24.171.502, 24.171.505, 24.171.507, 24.171.520, and 24.171.2101 exactly as proposed.

5. The board has repealed ARM 24.171.702 exactly as proposed.

6. The board has amended ARM 24.171.408 and 24.171.2301 with the following changes to the original proposal, stricken matter interlined, new matter underlined:

24.171.408 OUTFITTER RECORDS (1) Outfitters shall maintain current, true, complete, and accurate records, submit the records to the board as required by administrative rule, and make the records available at all times at the outfitter's main base camp or business office ~~to enforcement or investigative personnel authorized or appointed by the board, upon subpoena or order of a court, or written request of the board or a state or federal agency for law enforcement purposes. ;~~

(a) to enforcement or investigative personnel authorized or appointed by the board;

(b) upon subpoena or order of a court;

(c) upon written request of the board; or

(d) upon written request of a state or federal agency for law enforcement purposes.

(2) through (4) remain as proposed.

AUTH: 37-1-131, 37-47-201, MCA

IMP: 37-47-201, 37-47-301, MCA

24.171.2301 UNPROFESSIONAL CONDUCT AND MISCONDUCT

(1) through (1)(k) remain as proposed.

(l) make all client records available at the outfitter's main base camp or business office in accordance with ARM 24.171.408 ~~to enforcement or investigative personnel authorized or appointed by the board upon subpoena or order of a court or written request of the board or a state or federal agency for law enforcement purposes;~~

(m) through (3) remain as proposed.

AUTH: 37-1-131, 37-1-319, 37-47-201, MCA

IMP: 37-1-312, 37-1-316, 37-1-319, 37-47-201, 37-47-341, MCA

BOARD OF OUTFITTERS
ROBIN CUNNINGHAM, CHAIRPERSON

/s/ DARCEE L. MOE
Darcee L. Moe
Rule Reviewer

/s/ PAM BUCY
Pam Bucy, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State October 17, 2016